Supreme Court, U. S.
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Case No. 80-597

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

MARTIN PAINTING AND
COATING COMPANY,

Petitioner

vs.

RAY MARSHALL,
Secretary of Labor and
the Occupational Safety
and Health Review Commission

Respondent

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DOES THE OCCUPATIONAL SAFETY AND HEALTH ACT IMPOSE A STANDARD OF STRICT LIABILITY FOR EMPLOYEE NEGLIGENCE ON THE EMPLOYER?

2. DID THE DECISION OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ADOPT A STANDARD OF ADEQUATE SAFETY INSTRUCTION THAT IS ONLY VIOLATED IF THERE IS AN INJURY OR DEATH?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reproduced in Appendix A-2, attached hereto; it is as yet unreported. The opinion of the Occupational Safety and Health Review Commission reviewing the decision of Judge Burchmore is printed in Appendix A-10, attached hereto; it is reported at 5 BNA OSHC 1946 (1977). The opinion of Occupational Safety and Health Review Commission Judge Robert N. Burchmore is printed in Appendix A-21, attached hereto; it is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered July 17, 1980. The jurisdiction of this court is involved under 28 U.S.C. Section 1254(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 C.F.R. Section 1926.400(c)(1)

(c) Protection of employees. (1) No employer shall permit an employee to work in such proximity to any part of an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it by effective insulation or other means....

29 U.S.C. Section 654

(a) Each employer -

(1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) Shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

29 U.S.C. Section 666(j)

(j) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not,

and could not with the exercise of reasonable diligence, know of the presence of the violation.

5 U.S.C. Section 706(2)(E)

706. Scope of Review - To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(E) unsupported by substantial evidence in a case...otherwise reviewed on the record of an agency hearing provided by statute.

STATEMENT OF THE CASE

This case was before the United States Court of Appeals for the Sixth Circuit upon the petition of Martin Painting and Coating Company pursuant to 29 U.S.C. Section 660(a) seeking review of the decision of the Occupational Safety and Health Review Commission (OSHARC).

The case involves an accident which resulted in the death of an employee of Petitioner. The facts of the accident are as follows. On October 23, 1975, employee Glenn Stonerock was working on a water tower which Petitioner was under contract to paint. On that date Mr. Stonerock came into contact with some high voltage power lines and was electrocuted.

The experienced employee had been warned of the dangerous propensity and location of the power lines. He had also been subject to Petitioner's on-going safety program

which included specific instruction on safety procedures to be used near high voltage lines.

The Secretary of Labor cited Petitioner for a violation of the electrical power safety standard of the Occupational Safety and Health Act (29 C.F.R. 1926.400(c)(1)).

The case was initially heard by OSHARC Judge Burchmore who found in favor of Petitioner. On review by the OSHARC the administrative law judge was reversed. The reversal was affirmed by the Court of Appeals for the Sixth Circuit.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Importance of the Issue

In recent years the small to medium size business has been subjected to ever increasing amounts of government regulation. Good faith compliance with such regulation no longer assures that a business can be run peacefully and without government interference. In addition to these factors the decision of United States Court of Appeals of the Sixth Circuit has now imposed such burdensome safety requirements that compliance is impossible.

The Sixth Circuit has established as the test for adequate safety precautions whether or not accidents occur. In the instant case Petitioner had an active and on-going safety program that had proved adequate. The adequacy of this program is evidenced by Petitioner's excellent past

record. In addition, an experienced employee who had participated in the safety program was warned of the danger of the power lines and their location at the particular jobsite. The employee was also informed that no decision had yet been made on how or when to paint near the lines. In spite of this, the employee, in negligent disregard of all the warnings, safety training and information, chose to paint near the power lines. To hold the employer responsible for this employee negligence places a burden of strict liability on Petitioner and all other small business. The burden is too great.

Under this standard no amount of safety instruction or warning will relieve the employer of liability. Even constant supervision would not be adequate. It was never the intention of the Occupational Safety and Health Act to impose such a standard. The protection and safety of workers are an

important consideration but should not be used as a bludgeon against small business.

B. Conflicts with Other Circuits

Nearly every United States Court of Appeals has held that the general duty clause, 29 U.S.C. Section 654(a)(1), of the Occupational Safety and Health Act (hereinafter, the Act) does not impose a standard of strict liability on the employer. National Realty & Construction Co. vs. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); Brennan vs OSHRC, 501 F.2d 1196, 1200 (7th Cir. 1974); Brennan vs. OSHRC and Hendricks, dba Alsea Lumber Co., 511 F.2d 1139, 1144-45 (9th Cir. 1975); Horne Plumbing & Heating Co. vs OSHRC, 528 F.2d 564, 568 (5th Cir. 1976); Central Georgia Railroad Co. vs OSHRC, 576 F.2d 620, 623 (5th Cir. 1978); Rea Express, Inc. vs Brennan and OSHRC, 495 F.2d 822, 826 (2nd Cir. 1974); Ocean Electric Corp. v

Secretary of Labor, 594 F.2d 396, 399 (4th Cir. 1979); General Dynamics Corp., Quincy Shipbuilding Div. vs OSHRC, 599 F.2d 453 (1st Cir. 1979); Brennan vs OSHRC and Hanovia Lamp Division, Canred Precision Industries, 502 F.2d 946, 951 (3rd Cir. 1974); Marshall vs L. E. Myers Co. and OSHRC, 589 F.2d 270 (7th Cir. 1978); Empire-Detroit Steel Division, Detroit Steel Corporation vs OSHRC and Secretary of Labor, 579 F.2d 378, 384 (6th Cir. 1978).

In addition several circuits have held that the employer's duty under 29 U.S.C. Section 654(a)(2) which requires compliance with the regulations promulgated under the Act cannot be one of strict liability. The United States Court of Appeals for the Third Circuit held in Atlantic & Gulf Stevedores vs OSHRC, 534 F.2d 541, 547 (3rd Cir. 1976) that the general duty clause of the Act does not impose strict liability upon the employer and that the standard of

liability for violations of safety regulations is the same as that under the general duty clause; it cannot be greater.

The United States Court of Appeals for the Fifth Circuit held in Horne Plumbing & Heating Co. v OSHRC, 528 F.2d 564, 568 (1976) that the Act "neither authorizes nor intends" the imposition of a strict liability standard. In that case the court set aside and vacated a citation based on the violation of an OSHA regulation because upholding the citation would have imposed a standard of strict liability for employee misconduct or negligence.

Similarly, the Ninth Circuit held in Brennan vs OSHRC and Hendricks, dba Alsea Lumber Co., 511 F.2d 1139, 1144-45 (9th Cir. 1975) that to affirm a citation for violation of an OSHA regulation "would be to subject an employer to a standard of strict liability, under the special duty clause, for deliberate employee misconduct. We do not find that

result to be within the intent of Congress." The court noted, in addition, that had Congress intended to impose strict liability the statutory requirement of employee compliance with the Act, 29 U.S.C. Section 654(b) would not have been imposed.

In Ocean Electric Corp. vs Secretary of Labor and OSHRC, 594 F.2d 396, 399 (4th Cir. 1979) the court found that employer liability under the OSHA regulations is not "unqualified".

The decision reached by the Court of Appeals for the Sixth Circuit in the present case effectively establishes a standard of strict liability for determining violation of regulations promulgated under the Act. Since the Sixth Circuit's decision is obviously in conflict with the decision of

a number of other federal courts, certiorari should be granted to resolve this conflict.

Respectfully submitted,

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APPENDIX

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Opinion and Order dated July 17, 1980, USCA/6th Circuit, Martin Painting and Coating Co. vs Ray Marshall, Secretary of Labor and the Occupational Safety and Health Review Commission, affirming the Occupational Safety and Health Review Commission decision A-2

Decision, Secretary of Labor vs Martin Painting and Coating Company, citation by the Occupational Safety and Health Review Commission, 5 BNA OSHC 1946 (1977), dated October 7, 1977, affirming the citation and reversing administrative law Judge Robert N. Burchmore A-10

Decision, Secretary of Labor vs Martin Painting and Coating Company, decision and order vacating citation by Judge Robert N. Burchmore, May 17, 1976 .. A-21

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No. 77-3561

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARTIN PAINTING AND COATING COMPANY,

Petitioner

v.

RAY MARSHALL, Secretary of Labor and the Occupational Safety and Health Review Commission,

Respondents

O R D E R

Before: KEITH and MERRITT, Circuit Judges; PHILLIPS, Senior Circuit Judge

This proceeding for review challenges an order of the Occupational Safety and Health Review Commission. The Commission affirmed the Secretary of Labor's finding that Martin Painting and Coating Company had committed a serious violation of the electrical power safety regulations,

29 C.F.R. Section 1926.400(c)(1), issued pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. Section 651 et seq.[1] Martin Painting, which sought review under 29 U.S.C. Section 660(a), argues that there was no substantial evidence to support the Commission finding. We affirm.

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1 Section 5(a)(2) of the Act requires that every employer affecting interstate commerce "shall comply with occupational safety and health standards promulgated under the Act." 29 U.S.C. 654(a)(2). 29 CFR 1926.400(c)(1), the cited safety standard, provides in pertinent part:

> (1) No employer shall permit an employee to work in such proximity to any part of an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it by effective insulation or other means....

Section 17(k) of the Act, 29 U.S.C. 666(j), defines a serious violation as one creating a "substantial probability that death or serious physical harm could result...unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

Martin Painting was the employer of Glenn Stonerock, who accidentally was electrocuted on October 23, 1975. With a co-employee, Stonerock was painting a tower and water tank at the Jeffrey Mining Machinery Company's plant in Columbus, Ohio. Stonerock had suspended himself from the water tank in a movable boatswain's chair. As he worked on the northeastern leg of the tower, he came into contact with high voltage electrical lines that attached to the leg approximately forty feet above the ground. A Jeffrey employee found Stonerock's body lying across the wires, one to two feet from the empty boatswain's chair.

After an OSHA compliance investigator visited the site of the fatality, the Secretary of Labor cited Martin Painting for a violation of the OSHA electrical power safety standard. The Secretary proposed to fine Martin Painting $550, which

amount reflected the gravity of the violation discounted by Martin Painting's small size, cooperation with the investigation, and otherwise good safety record. See 29 U.S.C. Section 666(i) (criteria for assessment of fines by the Commission).

Martin Painting contested the citation and penalty. An administrative law judge of the Commission, finding that Martin Painting had a reasonable training program, vacated the Secretary's actions. The Secretary sought review by the Commission, which affirmed the citation but reduced the penalty to $400 in further recognition of Martin Painting's good faith cooperation. At issue before the Commission were the precautions taken by Martin Painting prior to the electrocution. Martin Painting, which denied knowledge of the violation, contended that it had exercised reasonable diligence with respect to the electrical hazard. The company noted that its field

supervisor for the Jeffrey project had warned Stonerock of the potential danger posed by the electrified wires. The field supervisor also had indicated that the company might provide a cherry-picker in lieu of the boatswain's chair for painting near the electrical lines. In addition, the field supervisor had arranged to have power to the lines shut off at a later date, on which Stonerock more safely could paint the northeastern leg, and had instructed Stonerock's co-worker to ask Jeffrey before painting whether the lines had been enervated. Martin Painting further observed that it had sponsored annual safety meetings for the employees, and generally had advised its workers to stay at least ten feet away from active electrical lines.

The Commission found that Martin Painting nonetheless had failed to use reasonable diligence to ensure Stonerock's

safety, and had knowledge of the violation. According to the Commission, Martin Painting had failed to give Stonerock any specific instructions regarding the lines. The company did not tell Stonerock, who was killed on a Thursday, about the plans to shut down the lines on the following Saturday. Nor did the company suggest that Stonerock should not work on the northeastern leg until then. The company likewise did not tell Stonerock, as it had told his fellow employee, to consult with Jeffrey regarding the deactivation of the lines. No cherry-picker was provided; nothing further ever was said about the cherry-picker. "Stonerock," the Commission concluded, "could well have believed that he had to paint close to the (electrical) lines in order to perform his job." The Commission thus reversed the decision of the administrative law judge and affirmed the citation issued by the Secretary.

Martin Painting has asked this Court to vacate the Commission's order. Under 29 U.S.C. Section 660(a), the findings of the Commission are conclusive "if supported by substantial evidence." This Court has interpreted the term "substantial evidence" to mean, in the context of OSHA violations, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Dunlop v. Rockwell Internat'l, 540 F.2d 1283, 1287 (6th Cir. 1976), quoting Jones v. Priebe, 489 F.2d 709, 710 (6th Cir. 1973). The evidence "must be enough to warrant denial of a motion for a directed verdict in a civil case tried to a jury." Id.

The evidence on which the Commission based its determination satisfies the substantiality test. Reasonable minds could differ over the implications of the evidence. Yet the evidence was not inadequate to support the finding that

Martin Painting should have anticipated the violation. Cf. Brennan v. Butler Lime and Cement Company, 520 F.2d 1011, 1017-19 (7th Cir. 1975) (negligence of employee does not relieve employer of responsibility for serious violation, where violation was foreseeable due to inadequacy of safety precautions).

Accordingly, the order of the Commission is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND

HEALTH REVIEW COMMISSION

SECRETARY OF LABOR Complainant, v. MARTIN PAINTING AND COATING COMPANY Respondent	)	OSHRC DOCKET NO. 15923

DECISION

Before: CLEARY, Chairman; and BARNAKO, Commissioner.

BY THE COMMISSION, A decision of Review Commission Judge Robert N. Burchmore, dated May 17, 1976, is before this Commission for review pursuant to 29 U.S.C. Section 661(i). That decision vacated a citation for a serious violation of the safety standard codified at 29 C.F.R. Section 1926.

400(c)(1)[1] on the basis that the evidence failed to establish that the respondent possessed the requisite knowledge of the alleged violation. On review, the complainant takes exception to this finding. For the reasons set forth below, the Judge's decision is reversed and the citation is affirmed.

The respondent is a painting contractor which contracted with the Jeffrey Mining and Machinery Company to paint a water tower and tank on Jeffrey's premises. High voltage power lines terminated 40 feet above ground near the northeast leg of the tower.

1/ That standard provides, in pertinent part as follows:

> No employer shall permit an employee to work in such proximity to any part of an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it by effective insulation or other means.

One of respondent's employees was electrocuted when he contacted these lines. There were no witnesses to the accident, since the deceased, Glenn Stonerock, was not within view of Bill Pickel,[2/] the only other painter on the job. No supervisor was at the site. Stonerock had apparently been working from a boatswain chair at the northeast leg. He was lying on the lines when he was found by a Jeffrey employee, but the evidence indicates that the boatswain chair was 1 to 2 feet from the high voltage lines at that time.

Jeffrey's maintenance superintendent, Daniel Hansen, had discussed the electrical hazard with respondent's president before work was commenced and indicated that it

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2/ This employee is referred to as Bill Pickrell in the Judge's decision, but the transcript indicates that his last name is Pickel.

would be necessary to turn off the power before any work was done in the vicinity of the northeast leg. He was not contacted, however, about deenergizing the lines before the fatal accident occurred.

The respondent's field supervisor, James Martin, testified that he had pointed out the lines to Stonerock and had told him they were "just like a red stick of dynamite in (his) pocket." Stonerock was also told that his supervisor was considering use of a "cherry-picker" to paint in the area near the power lines.[3/] Stonerock was not told to stay any specific distance away from the lines. Martin indicated, however, that he did not think Stonerock would be painting in the area, since plans were to wait until Saturday (2 days after

3/ This discussion was held on Tuesday; the accident occurred on Thursday, 2 days later. The supervisor had not been back to the site since Tuesday.

the accident) when the power could be turned off. Stonerock and Pickel had not been informed about waiting until Saturday and were not told to stay out of the area of the power lines. Although Pickel was told to check with Jeffrey's about whether the power was off, Martin did not instruct Stonerock or request Pickel to do so.

The respondent conducts periodic safety meetings at least once per year, and its employees had been told to stay at least 10 feet away from lines. If power lines could not be deenergized before working near them, they were to be insulated with a rubber blanket. Although the employees were shown a safety notice which indicated that they should stay 12 feet away from power lines, this occurred after the instant accident. Respondent may also have posted a sticker with the same admonition, but it was not established when it was posted or whether it was

probable that employees would see it.

Judge Burchmore found that employee training and instruction was reasonable and adequate to promote safety and that Stonerock had acted contrary to instructions in the absence of his supervisor. The citation was vacated because the Judge found that the respondent "is not reasonably chargeable with knowledge of the violation which the employee committed."[4/]

4/ In reaching this conclusion, Judge Burchmore relied on the prior Commission decision in Ira Holliday Logging Co., Inc., 73 OSAHRC 16/A2, 1 BNA OSHC 1200, 1971-73 CCH OSHD para. 15,688 (No. 237, 1973), appeal dismissed, No. 73-2170, 9th Cir., November 29, 1973. In that case, an employee was killed when he prematurely removed the binders on a load of logs before the logs were supported by an unloading machine. Holliday is distinguishable from the case before us because the Holliday employee had been specifically told to refrain from unfastening the binders prematurely and the Holliday supervisor had previously surveyed the unloading operation and had observed no safety infractions.

The complainant contends that the respondent did no more than warn its employees of the hazard and gave no instructions as to safe working distances or on how to avoid the hazard. The complainant stresses that plans to deenergize and paint on the following Saturday were not communicated to the employees affected by the hazard. The complainant also argues that an employer is obligated to specifically instruct its employees about safe working procedures when the employer has actual knowledge of the existence of a hazard to which employees will be exposed in the course of their work. He further submits that this requirement is particularly imperative where constant supervision is absent.

A divided Commission has held that the burden is upon the complainant to establish that an employer knew, or with the exercise of reasonable diligence should

have known, of the existence of conditions or practices upon which an alleged violation is based. In other words, either actual or constructive knowledge is an element of any violation of the Act. 5/ See, e.g., Scheel Construction, Inc., 76 OSAHRC 138/B6, 4 BNA OSHC 1825, 1976-77 CCH OSHD para. 21,263 (No. 8687, 1976), appeal dismissed, No. 77-1022, 8th Cir., February 10, 1977. An employer's failure to give adequate safety instructions to its employees reflects a failure to exercise reasonable diligence. Enfield's Tree Service, Inc., 77 OSAHRC 32/B2, 5 BNA OSHC 1142, 1977-78 CCH OSHD para. 21,607 (No. 9118, 1977). As the Commission has previously stated, "specific safety instructions and workrules concerning hazards peculiar to the job being performed

5/ The Occupational Safety and Health Act of 1970, 29 U.S.C. Section 651 et seq., 84 Stat. 1590.

are the essential foundations of an adequate safety program." Iowa Southern Utilities Co., 77 OSAHRC 32/C10, 5 BNA OSHC 1138, 1977-78 CCH OSHD para. 21,612 (No. 9295, 1977). These instructions must be communicated effectively to employees and uniformly enforced. Enfield's Tree Service, Inc., supra.

In Enfield's Tree Service, the Commission agreed with the Judge below that employees working close to energized lines required more specific and appropriate safety instructions than those received at general safety meetings. Similarly, in this case, Stonerock was not adequately instructed. He was not told not to work near the northeast leg, was not told that the work would be done on Saturday, and was not specifically instructed as to minimum safe clearance. Although he was informed two days before the accident that a "cherry-picker" might be used, none was

provided and nothing further was said. Although Pickel was told to check with Jeffrey's about deenergizing the lines, Stonerock was not. Indeed Stonerock could well have believed that he had to paint close to the lines in order to perform his job. Under these circumstances, the respondent failed to exercise reasonable diligence. The respondent therefore possessed the requisite constructive knowledge of the violation.

A violation is serious "if there is an substantial probability that death or serious physical harm could result from" a violative condition or practice. 29 U.S.C. Section 666(j). The Commission finds the violation to be serious in this case because of the danger of electrocution.

The complainant proposed a penalty of $550. After considering the entire record in conjunction with the statutory criteria in 29 U.S.C. Section 661(i), the Commission

finds that a $400 penalty is appropriate. Although the gravity of the violation was high, the respondent illustrated a high degree of good faith by its cooperation with the complainant's inspector during the investigation. Furthermore, respondent is a relatively small company and had no significant history of past violations.

Accordingly, the citation for a serious violation of 29 C.F.R. Section 1926.400(c)(1) is affirmed and a penalty of $400 is assessed for the violation.

FOR THE COMMISSION

/s/ William S. McLaughlin
Executive Secretary

DATED: Oct. 7, 1977

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant vs. MARTIN PAINTING AND COATING COMPANY Respondent	No. 15923

DECISION AND ORDER

Bruce C. Heslop for the Secretary of Labor.
R. Larry Schneider for the respondent.

BURCHMORE, Judge:

By citation issued November 12, 1975, complainant charges that on October 23, 1975, the respondent committed a serious violation of section 5(a)(2) of the Occupational

Safety and Health Act of 1970, 29 U.S.C. 651 et seq (the Act), in that respondent failed to comply with the Safety and Health Regulations for Construction as contained in 29 C.F.R. 1926.400(c)(1). Timely notice of contest was filed and the proceeding was assigned to the undersigned judge for hearing and adjudication. Hearing was held at Columbus, Ohio, on March 4, 1976. The parties have submitted briefs to the judge.

Respondent is a painting contractor whose employees regularly work with paint and materials that move in interstate commerce. I conclude that it is an employer engaged in a business affecting commerce within the meaning of the Act.

In October, 1975, respondent was engaged by the Jeffrey Mining Machinery Company to paint a high water tower and tank on their premises in Columbus, Ohio. Prior to beginning work, respondent's president discussed the job with the

customer's superintendent of maintenance, who pointed out a high voltage line leading to a point on the tower about 40 feet above ground. Respondent planned to arrange the work so that the line could be de-energized on a Saturday, to reduce inconvenience to the industry.

The work was supervised by a field supervisor of the respondent, one Martin, who called the attention of respondent's employees, Pickrell and Stonerock, to the high tension line and cautioned them against getting near it. He told them, "That line is like a stick of dynamite in your pocket." He did not discuss with the employees any arrangement for de-energizing the line or tell them when to do so.

Respondent has an active safety program and conducts meetings which the employees attend. At these meetings, there is discussion of hazards to be encountered in painting jobs and one of these hazards

is high tension lines. The policy of the company is that no employee shall come within twelve feet of such a line, and the employees are so instructed.

On the day of the alleged violation, Pickrell and Stonerock were working on the project and Stonerock was up on the tower in a boatswain's chair. Martin was not at the jobsite, being engaged elsewhere. Early in the evening, at a moment when Stonerock was not within sight of Pickrell, Stonerock came into contact with the high tension line and received fatal injuries.

An investigation ensued, and after an inspection of the premises, complainant issued the instant citation, charging the employer with violation of section 400(c)(1), which provides:

> (c) Protection of employees.
> (1) No employer shall permit an employee to work in such proximity to any part of an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric

> shock by deenergizing the circuit and grounding it or by guarding it by effective insulation or other means. In work areas where the exact location of underground electric power lines is unknown, workmen using jack-hammers, bars, or other hand tools which may contact a line shall be provided with insulated protective gloves.

It is evident from the facts recited that there was a breach of the regulation, but it cannot properly be charged to the employer unless the employer knew of the violation, or could with the exercise of reasonable diligence have known of it. Peter J. Brennan vs. Alsea Lumber Company, 511 F.2d 1139 (9th Cir. 1975). In this case, the respondent obviously knew nothing of the violation, so the question is whether the employer was under a duty to exercise such one to one supervision as would have been necessary to gain such knowledge.

In my opinion, the training and instruction of the employees was reasonable and adequate to promote safe working conditions in all situations except one of unforseeable

employee negligence and disregard of instructions. The facts here are essentially equivalent to those before the Commission in Secretary v. Ira Holliday Logging Co., Inc., 2 OSAHRC 1415 (No. 237), where an employee was killed when, contrary to instructions, he removed the chain binders on a load of logs before the logs were securely held by the unloading machine. In that case, the Commission dismissed the citation.

In this case, as in Holliday, the deceased acted contrary to instructions in the absence of his supervisor. I therefore conclude that respondent is not reasonably chargeable with knowledge of the violation which the employee committed.

A fatal accident is a terrible thing, and it is a primary purpose of the Act to prevent such occurrences. However, that purpose would not be furthered by penalizing an employer, after the fact, for an

occurrence over which it had no control and which was not reasonably foreseeable to it. In this case, the citation should be vacated.

It is ORDERED that the citation and proposed penalty be and the same are hereby vacated and that this proceeding be and the same is hereby discontinued.

/s/ Robert N. Burchmore
Judge OSAHRC

May 17, 1976

Supreme Court, U. S.
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No. 80-597

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARTIN PAINTING AND COATING COMPANY,
PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Washington, D.C. 20210

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-597

MARTIN PAINTING AND COATING COMPANY,
PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether there was substantial evidence establishing that petitioner committed a serious violation of a safety standard, promulgated under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, by failing to exercise reasonable diligence to prevent its employee's contact with an electric power circuit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A9) is not reported. The opinion of the Occupational Safety and Health Review Commission (Pet. App. A10-A20) is reported at 1977-1978 Occup. Safety & Health Dec. ¶ 22,239. A summary of the opinion of the administrative law judge (Pet. App. A21-A27) is reported at 1976-1977 Occup. Safety & Health Dec. ¶ 20,808.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1980. The petition for a writ of certiorari was filed on October 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Petitioner has accurately reprinted the statutory and regulatory provisions involved in this case (Pet. 2-4), except that the scope of judicial review is not governed by the Administrative Procedure Act, 5 U.S.C. 706(2)(E). The correct provision (see Pet. App. A8) is 29 U.S.C. 660(a), which provides in pertinent part:

> * * * The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. * * *

STATEMENT

Petitioner is a painting contractor that was employed by Jeffrey Mining and Machinery Company to

paint a water tower at Jeffrey's worksite in Columbus, Ohio. One of petitioner's employees, Glenn Stonerock, was electrocuted on October 23, 1975, when he came in contact with high voltage lines terminating near the northeast leg of the tower (Pet. App. A11-A12). Based on an investigation by a compliance officer of the Occupational Safety and Health Administration, the Secretary of Labor cited petitioner for a serious violation (see 29 U.S.C. 666(j)) of an OSHA safety standard providing that "[n]o employer shall permit an employee to work in such proximity to * * * an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it by effective insulation or other means * * *." 29 C.F.R. 1926.400 (c)(1).

It is undisputed that petitioner's management personnel were aware of the hazard. Petitioner's president had been informed by Jeffrey's superintendent that it would be necessary to deenergize the voltage lines before any work was performed around the northeast leg of the water tower (Pet. App. A12-A13). Petitioner's supervisor for the Jeffrey project stated that he had planned to take such action (*id.* at A13-A14, A23), but did not contact Jeffrey to make the necessary arrangements (*id.* at A13). Nor did he tell Stonerock or his co-worker of the plans, even though he visited the jobsite two days before the fatality (*id.* at A13-A14 & n.3). Although the supervisor pointed out the location of the high voltage lines to Stonerock and told him they were " 'like a red stick of dynamite' " (*id.* at A13), he did not tell Stonerock to refrain from working in the area un-

less the lines were deenergized (*id.* at A18).[1] Although the company had held annual safety meetings and had on occasion told its employees to stay at least ten feet away from electric power lines, the supervisor did not instruct Stonerock at the jobsite to stay a specified distance away from the lines terminating at the tower (*id.* at A6, A13-A14). And while the supervisor told Stonerock that there was a possibility protective equipment would be necessary, he neither instructed Stonerock to obtain such equipment nor told him it would be provided to him (*id.* at A13, A18-A19).

On these facts, the administrative law judge found that the employer had done all that was necessary to protect its employees and, under the "reasonable diligence" standard of 29 U.S.C. 666(j), could not have known of the violation. He therefore vacated the citation issued by the Secretary (Pet. App. A21-A27). The Occupational Safety and Health Review Commission reversed (*id.* at A10-A20), holding that neither the petitioner's general warning to Stonerock of the existence of the hazard nor its annual safety meetings fulfilled its obligation to take reasonable precautions to protect employees from foreseeable hazards.[2] Under the Commission's precedents, an employee working close to energized lines must receive explicit safety instructions and "more specific and appropriate safety instructions than those received at general safety meetings" (*id.* at A18). Based on

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[1] The supervisor told Stonerock's co-worker to "check with Jeffrey about the electricity" (Pet. App. A14); however, he did not tell this employee to relay the message to Stonerock, nor did he tell Stonerock himself (*ibid.*).

[2] The Commission reduced the penalty from $550 to $400, however, in light of petitioner's cooperation (Pet. App. A5).

the facts in this case, the Commission concluded that "Stonerock could well have believed that he had to paint close to the lines in order to perform his job," that the employer "failed to exercise reasonable diligence" to prevent his contact with the wires, and that the company "possessed the requisite constructive knowledge of the violation" (*id.* at A19).

The court of appeals affirmed, concluding that the Commission's finding that the company had committed a serious violation of the safety standard was supported by substantial evidence (Pet. App. A2-A9). The court acknowledged that reasonable minds could differ over the implications of the evidence (*id.* at A8), but held that the evidence was sufficient to support the Commission's finding that adequate safety instructions were not given and its conclusion that through the exercise of reasonable diligence petitioner could have anticipated that Stonerock might work in such proximity to the live electric power circuit that he risked coming into contact with it (*id.* at A8-A9).

ARGUMENT

Petitioner contends (Pet. 7-12) that the decision below conflicts with decisions in other circuits holding that the Occupational Safety and Health Act does not impose strict liability on employers for the unforeseeable and negligent actions of their employees. Contrary to petitioner's repeated assertions, however, the court of appeals did not impose a strict liability standard. Rather, it applied the "reasonable diligence" standard fixed by statute (see 29 U.S.C. 666 (j)), and simply upheld the Commission's fact finding that petitioner had not properly anticipated the

violation nor taken adequate safety precautions to prevent its occurrence (Pet. App. A8-A9).[3]

That legal standard was correctly applied to the facts of this case. The Act imposes an obligation on each employer "to assure compliance [with health and safety requirements] by his own employees." *Legislative History Of The Occupational Safety And Health Act Of 1970*, 92d Cong., 1st Sess. 150-151 (Comm. Print 1971). Annual safety meetings like those held by petitioner, during which many hazards are discussed in the abstract, are insufficient standing alone to fulfill this duty. An employer must also issue specific instructions at the worksite on safe procedures for handling particular jobs. See *Ames Crane & Rental Service, Inc.* v. *Dunlop*, 532 F.2d 123, 125 (8th Cir. 1976); *Getty Oil Co.* v. *OSHRC*, 530 F.2d 1143, 1146-1147 (5th Cir. 1976); *Brennan* v. *Butler Lime & Cement Co.*, 520 F.2d 1011, 1018 (7th Cir. 1975). The fact that an employee is experienced (Pet. 8) does not relieve the employer of this requirement, because even experi-

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[3] In focusing on the foreseeability of the violation, the court below implicitly recognized that imposition of strict liability is precluded by Section 17 of the Act, 29 U.S.C. 666. Section 17(k) provides that where there is "a substantial probability that death or serious physical harm could result," violations will be deemed "serious" unless the cited employer "did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. 666(j). The statute does not specifically excuse employers from "other than serious" violations on the same ground (see 29 U.S.C. 666(c)), but the Commission has read into it an equitable defense to such violations that mirrors the "lack of knowledge" defense of Section 17(k). See, *e.g.*, *Scheel Constr., Inc.*, 4 Occup. Safety & Health Cas. 1824 (1976).

enced employees sometimes neglect their safety responsibilities. See *Brennan* v. *OSHRC*, 491 F.2d 1340, 1341 (2d Cir. 1974). An employer is therefore responsible for an employee's carelessness unless it takes reasonable precautions to protect against the possibility of carelessness. See *Brennan* v. *Butler Lime & Cement Co.*, *supra*, 520 F.2d at 1017; *Nat'l Realty & Constr. Co.* v. *OSHRC*, 489 F.2d 1257, 1266-1267 n.37 (D.C. Cir. 1973).

In light of the life-threatening nature of the hazard involved here, the negligible effort that would have been required to tell Stonerock at the jobsite to stay ten feet away from the electric power lines until they were deenergized, and the opportunity available to the supervisor to so instruct him, the Commission had ample basis for concluding that petitioner did not in this instance conduct itself as a reasonably diligent employer. See *Getty Oil Co.* v. *OSHRC*, *supra*. Accord, *Usery* v. *Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977). Petitioner's challenge to the sufficiency of the evidence supporting this conclusion was properly rejected by the court of appeals, and further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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